

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs March 25, 2009

**VICTOR E. MCCONNELL v. HAROLD CARLTON, WARDEN**

**Appeal from the Criminal Court for Johnson County**  
**No. 5080     Robert E. Cupp, Judge**

---

**No. E2008-00986-CCA-R3-HC - Filed May 19, 2009**

---

The petitioner, Victor E. McConnell, appeals from the Johnson County Criminal Court's denial of his petition for writ of habeas corpus. In this appeal, the petitioner claims entitlement to habeas corpus relief because the sentences imposed following his 1983 guilty pleas to first degree murder, *see* T.C.A. § 39-2-202 (1982), and assault with intent to commit first degree murder, *see id.* § 39-2-103, are illegal. Because the irregularities in the petitioner's judgments can be classified as clerical errors, we affirm the denial of habeas corpus relief.

**Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Victor E. McConnell, Mountain City, Tennessee, pro se.

Robert E. Cooper, Jr., Attorney General and Reporter; and Rachel West Harmon, Assistant Attorney General, for the appellee, State of Tennessee.

**OPINION**

On March 8, 1983, the petitioner, Victor E. McConnell, entered pleas of guilty in case number 151362 to aggravated rape, in case number 152488 to burglary, in case number 152501 to first degree murder, and in case number 152502 to assault with intent to commit first degree murder. The record establishes that the trial court imposed a sentence of 20 years for aggravated rape, 15 years for burglary to be served consecutively to the aggravated rape sentence, life imprisonment for first degree murder to be served consecutively to the aggravated rape sentence, and life imprisonment for assault with intent to commit first degree murder to be served consecutively to the first degree murder sentence. Additionally, the judgments reflect a Range II, 40 percent release eligibility classification on the sentences for burglary, first degree murder, and assault with intent to commit first degree murder.

On May 3, 2007, the petitioner filed a petition for writ of habeas corpus, his second,<sup>1</sup> alleging that the judgments in case numbers 152501 and 152502 were void because the sentences imposed for each conviction, life imprisonment with a 40 percent release eligibility, directly contravene statutory provisions in effect at the time of the convictions. After the State's initial motion to dismiss inaccurately claimed that the May 3, 2007 petition alleged the same sentence illegality as the petitioner's first request for habeas corpus relief, the State filed an amended response averring that the 40 percent release eligibility classification noted on each challenged judgment was a "clerical error." In its order denying habeas corpus relief, the habeas corpus court agreed.

In this appeal, the petitioner, citing Code section 29-21-116, first submits that the habeas corpus court erred by denying his petition in the absence of the State's filing "a proper return or answer to the petition with a copy of the written authority under which the State is holding petitioner annexed to the return." Tennessee Code Annotated section 29-21-116 provides as follows:

**Defendant's appearance and return -- Answer.**

(a) Service being made in any of the modes provided for in this part, the defendant shall appear at the proper time, and make due return of the writ, and answer the petition, if required.

(b) The person served with the writ shall state in the return, plainly and unequivocally:

(1) Whether the person then has, or at any time has had, the plaintiff in the person's control or restraint, and, if so, the authority and cause thereof, setting out the same fully;

(2) If the party is detained under a writ, warrant, or other written authority, a copy thereof shall be annexed to the return, and the original shall be produced and exhibited to the court or judge, if required; and

(3) If the person on whom the writ has been served, has had the plaintiff in the person's custody or power or under the person's restraint, at any time before or after the date of the writ, but has transferred the plaintiff to another person, that person shall state the facts explicitly, and to whom, at what time, for what cause, and by what authority such transfer was made.

---

<sup>1</sup>In his first petition for writ of habeas corpus, the petitioner alleged that the sentences imposed on March 8, 1983, were illegal because the judgments for first degree murder and assault with intent to commit first degree murder did not specifically state that the sentences were to be served consecutively to the sentences imposed for burglary and aggravated rape. *See Victor E. McConnell v. Howard Carlton, Warden, and State*, No. E2006-00967-CCA-R3-HC (Tenn. Crim. App., Knoxville, Oct. 5, 2007). This court affirmed the Johnson County Criminal Court's denial of that petition via Rule 20 of the Rules of the Court of Criminal Appeals. *See id.*

(c) The return shall be signed by the person making it, and verified by the oath; unless the person is a sworn public officer, and makes the return in an official capacity.

T.C.A. § 29-21-116 (2006).

We need not tarry long over the petitioner's first claim. We first point out that the provisions of Code section 29-21-116 are applicable only after the writ has been issued. *See Charles Ray O'Quinn v. Howard Carlton, Warden*, No. 03C01-9703-CR-00084, slip op. at 5-6 (Tenn. Crim. App., Knoxville, Feb. 6, 1998) ("It is only *after* the writ has been issued and the respondent served that Tenn[essee] Code Ann[otated] § 29-21-116 is applicable.") (internal quotation marks and citation omitted)). When faced only with an application for the writ, no answer is required by the State. *Id.*, slip op. at 6. Despite this, the State, in its response to the petition filed after the habeas corpus court denied its motion to dismiss, stated that the petitioner was "currently incarcerated at the Northeast Correctional Complex" by virtue of "convictions for murder in the first degree and assault with intent to commit murder in the Hamilton County Criminal Court," which judgments of conviction the State attached to its response. Further, the State provided in its response a basis for dismissal of the petition. Because Code section 29-21-116 is inapplicable in the present case and because the State furnished the habeas corpus court with sufficient factual authority to support the summary dismissal of the petition, the petitioner is not entitled to relief on this issue.

The petitioner also contends that the habeas corpus court erred by summarily dismissing his petition because he was, in fact, entitled to habeas corpus relief. Specifically, he contends that the habeas corpus court erred by denying relief "when the trial judge unequivocally admitted on the record that petitioner was sentenced under an illegal judgment."

"The determination of whether habeas corpus relief should be granted is a question of law." *Faulkner v. State*, 226 S.W.3d 358, 361 (Tenn. 2007) (citing *Hart v. State*, 21 S.W.3d 901, 903 (Tenn. 2000)). Our review of the habeas corpus court's decision is, therefore, "de novo with no presumption of correctness afforded to the [habeas corpus] court." *Id.* (citing *Killingsworth v. Ted Russell Ford, Inc.*, 205 S.W.3d 406, 408 (Tenn. 2006)).

The writ of habeas corpus is constitutionally guaranteed, *see* U.S. Const. art. 1, § 9, cl. 2; Tenn. Const. art. I, § 15, but has been regulated by statute for more than a century, *see Ussery v. Avery*, 432 S.W.2d 656, 657 (Tenn. 1968). Tennessee Code Annotated section 29-21-101 provides that "[a]ny person imprisoned or restrained of liberty, under any pretense whatsoever, except in cases specified in § 29-21-102, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment and restraint." T.C.A. § 29-21-101 (2006). Despite the broad wording of the statute, a writ of habeas corpus may be granted only when the petitioner has established a lack of jurisdiction for the order of confinement or that he is otherwise entitled to immediate release because of the expiration of his sentence. *See Ussery*, 432 S.W.2d at 658; *State v. Galloway*, 45 Tenn. (5 Cold.) 326, 336-37 (1868). The purpose of the state habeas corpus petition is to contest a void, not merely a voidable, judgment. *State ex rel. Newsom v. Henderson*, 424 S.W.2d 186, 189 (Tenn. 1968). A void conviction is one which strikes at the jurisdictional integrity of the trial court.

*See Coleman v. Morgan*, 159 S.W.3d 887, 890 (Tenn. Crim. App. 2004). Because in the petitioner's case the trial court apparently had jurisdiction over the *actus reus*, the subject matter, and the person of the petitioner, the petitioner's jurisdictional issues are limited to the claims that the court was without authority to enter the judgments. *See Anglin*, 575 S.W.2d at 287 ("Jurisdiction' in the sense here used, is not limited to jurisdiction of the person or of the subject matter but also includes lawful authority of the court to render the particular order or judgment whereby the petitioner has been imprisoned."); *see also Archer*, 851 S.W.2d at 164; *Passarella*, 891 S.W.2d at 627.

Here, the petitioner contends that his life sentences for first degree murder and assault with intent to commit first degree murder are illegal because the judgment for each conviction ascribes a 40 percent release eligibility percentage despite that the Code provided that sentences imposed for Class X felonies "[t]erminate or expire only after service of the entire sentence, day for day, under the control and supervision of the [S]tate of Tennessee," *see* T.C.A. § 39-1-703(3) (1982), and that "[t]he release classification date for a single life sentence shall be thirty (30) years," *see id.* § 40-28-301(f). Although we agree that the 40 percent release eligibility classification provided for in the judgments in this case violates these Code provisions, the conclusion does not end our inquiry.

In *Summers v. State*, 212 S.W.3d 251 (Tenn. 2007), our supreme court clarified the threshold procedural requirements for presenting an illegal sentence claim via a petition for writ of habeas corpus. *Id.* at 259-60. The court ruled that a bare allegation of illegality is insufficient based upon the procedural requirements of the habeas corpus statute. *Id.* at 261. Accordingly, the court held that, contrary to some previous interpretations of its decision in *McLaney v. Bell*, 59 S.W.3d 90 (Tenn. 2001), summary dismissal is appropriate unless "the alleged illegality is apparent from the pro se petition and the documents attached thereto." *Id.* at 259. *Summers* says that where the illegality alleged is that the sentence was imposed in contravention of a statute, the habeas corpus petitioner must attach to his petition those portions of the record that support his illegal sentence claim if the illegality is not apparent from the face of the judgment. *Id.* at 262.

In this case, the documentation attached to the State's response to the petition for writ of habeas corpus vitiates the apparent sentencing illegality in the judgments. Although the petitioner's judgments indeed evince an illegal release eligibility percentage, the portion of the sentencing hearing transcript attached to the response establishes that the trial court did not set a 40 percent release eligibility for the life sentences. The following colloquy occurred at the hearing:

THE COURT: Did you understand further that as to the life imprisonment for murder, the life imprisonment for assault with intent to commit murder and the burglary in the first degree, 15 years, that you're being sentenced as an aggravated offender, which is Range II, which means that you're not eligible for probation as to any of those cases or parole as to any of those cases until you have served a minimum of 40 percent. Is that correct, [General] Evans?

[GENERAL] EVANS: Yes. Well, the life imprisonment is life in prison. Percentage would only apply to if there's a - - in the new judicial sentencing law they break down life to some years. But that is only to develop the range. Under the new law life is life. He is responsible day for day.

[DEFENSE COUNSEL]: Percentages do not apply and he's not eligible for parole consideration.

THE COURT: All right, have you told him that?

[DEFENSE COUNSEL]: Yes.

THE COURT: All right.

[DEFENSE COUNSEL]: Until after service of a minimum of 30 years on each one.

THE COURT: All right. Did you understand that?

THE [PETITIONER]: Yes.

This exchange establishes that the bargained-for sentence was life imprisonment for each offense with no release eligibility percentage and that this was the sentence the trial court intended to impose for each offense. Moreover, the record establishes that the defendant was fully aware that the 40 percent release eligibility was inapplicable to the two life sentences and that he would be required to serve a minimum of 30 years' imprisonment before parole eligibility. This was an accurate statement of the law at the time of the offenses. *See* T.C.A. § 40-28-301(f) (1982).

When there is a conflict between the transcript and the judgment form, the transcript controls. *See, e.g., State v. Moore*, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991); *State v. Jimmy Lee Cullop, Jr.*, No. E2000-00095-CCA-R3-CD, slip op. at 14 (Tenn. Crim. App., Knoxville, Apr. 17, 2001) (remanding for correction of sentence alignment in judgment form to conform to alignment reflected in transcript). Because the transcript in this case establishes that the trial court did not impose an illegal sentence, the erroneous release eligibility included in the judgments for first degree murder and assault with intent to commit first degree murder can be classified as clerical errors. Because "mere clerical errors in the terms of a sentence may not give rise to a void judgment," *Coleman*, at 890, the habeas corpus court did not err by summarily denying habeas corpus relief.

The petitioner also claims, for the first time on appeal, that the sentences imposed are illegal because the State failed to file notice that it would seek enhanced punishment and because he was not permitted to present mitigating evidence at his sentencing hearing. Because these claims

do not affect the conviction court's jurisdiction to impose the conviction judgments, they are unavailing to the petitioner in this habeas corpus proceeding.

Accordingly, the judgment of the habeas corpus court is affirmed.

---

JAMES CURWOOD WITT, JR., JUDGE